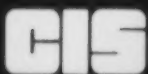


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REVIEW OF GSA'S LEASE MANAGEMENT AT
WATERSIDE MALL

(The Case of the Missing Cafeteria)

REPORT

OF THE

SUBCOMMITTEE ON INVESTIGATIONS
AND OVERSIGHT

OF THE

COMMITTEE ON PUBLIC WORKS AND
TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES



MAY 1984

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LETTER OF TRANSMITTAL

WASHINGTON, D.C., May 9, 1984.

Hon. JAMES J. HOWARD,
*Chairman, Committee on Public Works and Transportation, House
of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: The Subcommittee on Investigations and Oversight undertook a review of the General Services Administration's performance as the landlord for the federal government upon learning that a contractual right to a developer-provided cafeteria had been lost.

I am pleased to forward to you the attached report which summarizes the results of that effort and contains the Subcommittee's conclusions and recommendations to guide the General Services Administration in future efforts.

I believe you will find this report to be informative, objective, and a valuable aid to those who would negotiate on the government's behalf, especially as those negotiations may relate to contractual rights.

With best wishes, I am

Very truly yours,

ELLIOTT H. LEVITAS,
Chairman,
Subcommittee on Investigations and Oversight.

FOREWORD

The federal budget for the leasing of government facilities is estimated at \$1 billion for Fiscal Year 1985. Mismanagement of a leasing program of this magnitude could easily result in substantial and sizable additional costs to the Federal government.

The Public Works and Transportation Committee, as the authorizing committee of the U.S. House of Representatives, has the responsibility of ensuring that the U.S. General Services Administration performs its duties efficiently. The Committee must ensure that the agency adheres to the policies and intent of the enabling legislation designed for that purpose.

This report by the Subcommittee on Investigations and Oversight results from a lengthy inquiry into the administration of a lease agreement by the General Services Administration in which a valuable contractual right of the U.S. Government was lost because of bureaucratic inaction and inefficiency.

I believe this report will serve as a valuable resource document to the Congress, the General Services Administration, and all governmental agencies who may someday be faced with the need for new space or the renegotiation of existing leases.

JAMES J. HOWARD, .

Chairman,

Committee on Public Works and Transportation.

I. INTRODUCTION

The U.S. General Services Administration (GSA) is responsible for constructing, acquiring and altering the public buildings of the federal government. "Public building" means any building, whether for single or multi-tenant occupancy, suitable for office or storage space for one or more Federal agencies. GSA's authority is derived from the Public Buildings Act of 1959.

The Subcommittee on Investigations and Oversight wanted to assess GSA's role as the federal government's landlord. In the case of the Waterside Mall's "missing cafeteria," the administration of this lease agreement by the GSA has resulted in a U.S. Department of Justice concurrence with the GSA Board of Contract Appeals determination that the government's legal rights to a developer-provided cafeteria have been lost.

This report is a study of what can happen to a contractual right of the U.S. Government when bureaucratic inaction and inefficiency go undetected and uncorrected over a long period of time. It reviews actions and decisions of officials of GSA, the Environmental Protection Agency (EPA) and a private firm, Town Center Management Corporation, (TCMC) of Washington, D.C. as well as their inaction and indecision.

No fraud or willful misconduct has been alleged on the part of the principals, although Subcommittee Chairman Elliott H. Levitas observed at one point during the investigation that "heavy footprints of perjury" were discernible in some of the sworn testimony.

The subcommittee focused on the following questions:

- (1) Was the Waterside Mall lease agreement negotiated between GSA and TCMC favorable to the government?
- (2) Did the original lease agreement contain a specific clause which required the lessor to provide, at his expense, a cafeteria for EPA employees?
- (3) Why did the government-version and the lessor-version of the final lease agreement contain different requirements concerning the cafeteria?
- (4) What action, if any, did GSA officials take to ensure prompt installation of the cafeteria by the lessor?
- (5) What action, if any, did the lessor take to forestall installation of the cafeteria?
- (6) Did any pattern of behavior by GSA, EPA or TCMC officials constitute an "implicit waiver" of the cafeteria provision?
- (7) Do legal grounds exist on which to base any further claim for a lessor-provided cafeteria?

(1)

(8) What, if any, monetary loss did the government incur as a result of the forfeiture of a lessor-provided cafeteria and are such costs recoverable to the government.

(9) To what extent did inadequate recordkeeping on the part of GSA hinder the subcommittee's investigation?

(10) What controls have been proposed or implemented at GSA to prevent future "missing cafeteria" cases?

More than 12 years have passed since negotiations began between GSA and a private developer for the leasing of approximately 400,000 square feet of office space in which to house the then newly-created EPA. We believe there are conclusions to be drawn from this review which can be helpful in guiding GSA as the primary provider of space and equipment for the federal government. There are messages for other federal agencies as well.

The subcommittee's work drew upon numerous earlier investigations, including those undertaken by the General Accounting Office (GAO), GSA's Office of Investigations, the GSA Inspector General, the EPA Inspector General, the U.S. Department of Justice and from the hearing record of the U.S. Board of Contract Appeals. Five days of hearings were held over a twenty-month period, and thousands of official records, notes, memoranda and documents were examined in an effort to resolve some of the questions noted earlier.

II. EARLY HISTORY

EPA was established as an independent agency in the executive branch on December 2, 1970. A Bureau of the Budget task force, assigned the responsibility of locating interim and permanent space to house the new agency, worked with GSA officials to determine EPA's requirements, including its space needs.

On January 5, 1971, EPA's Chief of Real Property and Space Management, M. T. Yaroeh, submitted a formal request to GSA for approximately 400,000 square feet of leased space in which to house an estimated 2,145 employees.

GSA responded to the EPA space request with the issuance of Solicitation for Offers No. 55, dated January 19, 1971, requesting offers for approximately 400,000 square feet of leased space, limited to the area of southwest Washington, D.C., to be provided for occupancy on or before June 30, 1972.

Testimony before the subcommittee, and the GSA Board of Contract Appeals, indicates there were only two copies of Solicitation No. 55 sent to potential lessors for EPA: L'Enfant Plaza West, Inc., and TCMC.

TCMC had been in touch with GSA officials on a continuing basis, since mid 1970, keeping them informed of the amount and type of space being created as well as the projected dates of availability. According to the L'Enfant Plaza representative, GSA officials called by phone and asked them to submit an offer in response to the solicitation.

The offer by L'Enfant Plaza West, Inc., was for 393,318 square feet in the L'Enfant Plaza West building at an annual rental rate of \$7.06 per square foot, including all services and utilities. TCMC on January 19, 1971, offered 420,000 square feet in the Waterside Mall Office

Tower East and West buildings at an annual rental rate of \$5.74 per square foot, including all services and utilities, or \$5.31 per square foot, excluding utilities. Negotiations resulted in an amended offer from TCMC on February 12, 1971, of 443,800 square feet of space at an effective average annual rental rate of \$5.07 per square foot, excluding utilities, and an agreement on an inflation clause to cover future appreciation in property values. No change was made by L'Enfant Plaza West, Inc. in its offer.

On February 19, 1971, GSA's Acting Assistant Commissioner for Operating Programs, Larry F. Roush, directed a letter to the Commissioner of GSA's Public Buildings Service requesting 20-year leasing authority for the space in the Waterside Mall complex as amended in the TCMC offer. Roush recommended that GSA be authorized to exercise the option to lease an additional 60,000 square feet projected to be built in the East Mall. GSA Administrator Robert L. Kunzig and Commissioner of Public Buildings Service Arthur F. Sampson concurred in the letter of request.

On that same day, a GSA letter of acceptance, or "counteroffer," was signed by officials of GSA and TCMC, along with a formal lease agreement, #GS-03-B-5788.

The formal lease agreement incorporated into the lease package, by reference:

(a) General lease specifications and requirements, dated January 19, 1971, which were part of Solicitation for Offers No. 55.

(b) TCMC's offer, dated January 27, 1971, as amended by the February 12, 1971 offer:

(c) GSA letter of acceptance, dated February 19, 1971 (counteroffer).

GSA and TCMC were soon in disagreement as to whether a cafeteria facility, was required at the expense of Town Center, and in space not leased by the federal government.

According to information subsequently developed by GSA's Inspector General, GSA officials asked TCMC on April 9, 1971, to set a date for the opening of the cafeteria. On May 25, 1971, TCMC indicated that the cafeteria would open July 15 or 20, would consist of 4,200 square feet of space, and would be operated by The International Cafe, a Washington, D.C. firm.

And, according to a March 10, 1972 memorandum to Larry Roush from the Acting Assistant Commissioner for Buildings Management Frank L. Capps, TCMC's President, at a June 18, 1971 meeting in his office, assured GSA and EPA representatives present that—

... a cafeteria facility would be provided. It was to be located on the second level at the south end of the complex.

He briefly described the facility as initially comprising 10,000 square feet of space but with provisions to expand it to 16,000 square feet if the need for a larger facility should develop.

Over the next several months, GSA representatives pressed TCMC for interim alternative food facilities to accommodate the EPA personnel that would begin occupying the office space in August. Between then and early 1972, however, TCMC's position had apparently shifted from that of providing the government a cafeteria to a discussion of

alternative eating facilities. TCMC advised GSA of the restaurants, snack bars and vending facilities that had leased space at Waterside Mall, effective on a phased basis between November 1971 and February 1972. They noted the possibility that the food facilities may not open on their lease commencement dates and agreed to expand the vending machine facilities until such time as the permanent food facilities were open for business.

On February 4, 1972, GSA Contracting Officer Arthur O. Barton wrote TCMC, stating that the lease required a cafeteria, that over 800 EPA employees now occupied Waterside Mall office space with another 800 due in March, and that the firm had failed to provide the requested information on the eating facilities to be established in the mall.

In a letter dated February 7, 1972, TCMC President Charles Bresler took the position that the previously described private food facilities satisfied the current occupancy and the lease requirement, and that as soon as additional information became available on new food facilities, that information would be provided.

During a meeting with TCMC on February 8, attended by both GSA and EPA representatives, the firm again argued that the restaurants and snack bars planned for Waterside Mall would provide quality food at reasonable prices to EPA employees, and that these food facilities eliminated the need for a cafeteria.

Inadequate recordkeeping by involved parties in the Waterside Mall case complicated the reconstruction of correspondence that was discussed at various meetings and of motivation regarding the establishment of a government food facility at Waterside Mall.

However, two GSA memoranda reported on the February 8 meeting between TCMC and the GSA and EPA staffs. The first, dated March 10, 1972, from the Acting Assistant Commissioner for Buildings Management to Larry Roush:

. . . Mr. Bresler stated that he had eliminated the cafeteria facility from further consideration when his prospective concessionaire had withdrawn from negotiations and he had been unsuccessful in his efforts to interest another food service firm in the project. Mr. Bresler attributed the withdrawal of the original firm and the unwillingness of other firms to negotiate, to their determination that it would be economically unfeasible to make the substantial investment which would be required to establish a cafeteria in the face of competition from the other food facilities that he indicated would be established within the complex and also in the surrounding vicinity.

Mr. Bresler indicated that he had obtained the concurrence of the General Services Administration (GSA) to delete the cafeteria as the combined services to be offered by the other food facilities were more than adequate to satisfy the requirements of the lease contract.

The memorandum also mentioned that GSA had researched the pertinent files but found no record of any transaction or discussion which could have been construed to waive the lessor's contractual obligation to provide a cafeteria.

A second memorandum, dated May 4, 1972, from A. W. Innamorati, Assistant Commissioner for Buildings Management, to H. D. Harvell, Deputy Assistant Commissioner for Operating Programs (Roush's assistant) reported of the February 8 meeting that:

Mr. Bresler stated that he could provide a cafeteria; however, he did not need to because the cafeteria requirement was deleted from the lease by means of an exchange of letters. Correspondence regarding this situation has never been obtained from our respective offices or Mr. Bresler's.

To this day, no such letters have been found.

III. TWO VERSIONS OF THE SAME LEASE?

Following the February 8 meeting, GSA contracting officer Barton wrote to TCMC, on February 9, and requested specific information about the eating establishments that would be operating in Waterside Mall. This letter was followed on February 28, 1972 by another from Mr. Barton to TCMC reemphasizing the original cafeteria requirement, "... as listed on Schedule B, Part III. Article 10, (a), (1), (2), and (3) on page 27 of the lease solicitation." (The provision required a cafeteria in space not leased by the Government and without cost to the Government.) It further stated that because the firm had failed to provide adequate food facilities up to that date, rent would be withheld by GSA beginning March 31, 1972, until tangible evidence was provided that the cafeteria requirement would be satisfied.

Mr. Bresler responded to Mr. Barton by a letter dated March 2, 1972 and enclosed an excerpt which he stated was from Solicitation No. 55 dated January 19, 1971, that—

... as listed in Schedule B, Article 10, gives the Government the right to install food service, or vending facilities within the confines of the leased space.

Mr. Bresler then referred to the original negotiations for the space and the discussions concerning food facilities:

While there were no requirements for a food facility, all parties recognized the need for such facilities, and originally, provisions were discussed and considered regarding the operation of a food facility, including an executive dining room to seat approximately thirty (30) persons. There was a question whether such an installation should be operated by G.S.I., or a private operator.

As negotiations proceeded we advised G.S.A. of the interest of many food operators in locating within this project. In consultation with G.S.A., we agreed that due to G.A.O., and congressional investigations of cafeteria and executive dining room facilities within G.S.A. occupied buildings, and the complaints being lodged by the Restaurant Association, and restaurant operators in the Southwest Area, particularly against the G.S.I. operations in the Forrestal, HUD, and DOT Buildings, no effort would be made to provide space for such a facility within the complex. However, we indicated that if private food service operators did not choose to locate

within the Mall we would make space available to G.S.A. for a food facility.

After the lease was signed by G.S.A., and prior to occupancy by the Agency we negotiated leases for a variety of privately operated food facilities which will be located within the adjoining mall complex. All of the prospective food service tenants questioned us whether there was to be a G.S.A. facility. Before executing any of these leases we were informed by G.S.A. that if the private facilities were adequate to serve the needs of the Agency there would be no requirement for a Government operated food facility.

After discussing the matter with G.S.A. representatives *a determination was mutually reached that the requirement for a Federally operated facility would be informally waived* and no request for executive dining privileges would be instituted by the Agency. (Emphasis added.)

We realize that you, as Contracting Officer, and under the terms of the lease solicitation have the right to insist on a Government food facility within the demised premises, however, we feel that the enforcement of such a requirement would be a breach of faith with the business community and those restaurant tenants who have executed leases in good faith, on the assumption that there would not be a Government food facility within the complex.

Mr. Bresler's statement that the government had "informally waived" the cafeteria requirement is contradictory to his alleged comments at the February 8 meeting that the requirement was deleted by means of an exchange of letters.

More than four years later, on October 7, 1976, when the cafeteria case was receiving renewed attention, Mr. Bresler wrote another letter to GSA, and once more alluded to the problems which would arise if a cafeteria were to be opened at the mall.

Needless to say, the threat of a "government-run cafeteria" exerted a chilling effect on potential tenants. Based on the subsidies and contributions provided by GSA to a "government-run cafeteria" the small merchants now operating in the mall and any potential new operators would be at a material disadvantage. The existing operators have advised me that any attempt to install a "government-run cafeteria" would be fought through the courts.

Subsequently at a meeting on March 30, 1972, TCMC again produced a version of Paragraph 10(a) of Solicitation No. 55 which differed from the government's copy of the same document.

The government's copy of Solicitation No. 55, which became the language contained in the government's copy of the February 19, 1971 lease agreement read as follows:

10. FOOD SERVICE AND VENDING STANDS

a. Cafeteria

- (1) A complete cafeteria facility shall be furnished by the lessor at his expense with capacity large enough to

serve food to the Federal employees who will work in the leased space as provided in subparagraph (2) below. The size of the dining area shall be based on a Federal employee population of one person for every 150 net usable square feet of office spaced leased to the Government and a turnover of three persons per seat for the luncheon period. At downtown locations with other suitable food service facilities located within a readily accessible area, it may be estimated that 50 to 55 percent of the total employee population will patronize the required facility daily. At remote locations the estimated patronage should be increased to 60 to 65 percent of the employee population. The Government will ascertain which criteria is to apply to the space offered. A minimum of fifteen square feet shall be allowed for each seat required by these standards. Additional area of from 10 to 15 square feet per seat shall be allowed for supporting areas such as kitchen, food preparation, storage (including storage for all vending operations), locker and trash areas.

(2) The management of the cafeteria operation shall be such as to provide Federal employees with high quality and convenient food service, under sanitary and healthful conditions at the most reasonable prices possible. In order to accomplish the objective such economy producing techniques as self busing and self service shall be practiced, and attractive tables and chairs, attractive decor throughout, and, non-disposable tableware, including china, eating utensils, cups and saucers and glasses shall be provided. To further contribute to this objective, the cafeteria operator shall control and receive the income from all vending machines in the building except those operated by a blind person as provided in (b) below and in direct competition with his stand as determined by the government. . . .

(3) All space occupied by the cafeteria shall be excluded from the area covered by the lease and the lessor shall assume full control of such space without cost to the government for rental, utilities, or other charges. . . .

TCMC's copy of the lease agreement contained the following paragraph, which represented GSA's standard lease form for requirements in lieu of a cafeteria:

VENDING FACILITIES

The Government shall have the right to install a food service or vending facility within the confines of the leased space to be operated by blind persons licensed under the provisions of the Randolph-Sheppard Act. . . .

In addition, the Government shall have the privilege of installing vending machines within the confines of the space leased and determining the assignment of revenue therefrom.

In addition to vending stands operated by the Randolph-

Sheppard Act . . . the lessor must install without cost to the Government all mechanical, electrical and plumbing facilities, including but not limited to hot and cold water . . . and airconditioning required for such facilities.

Despite the obvious discrepancy no satisfactory explanation was elicited as to how TCMC could have a different version of what was required of it

To compound this discrepancy, two of GSA's officials who negotiated the lease with TCMC testified before the Subcommittee they had no recall of any such discussion of a government operated food facility during negotiation sessions, as was detailed in Mr. Bresler's letter of March 2, 1972. In fact, both stated it was their impression at the time that all parties in the negotiations understood that a cafeteria was to be provided by the lessor.

Unfortunately, no notes were taken during the lease negotiation sessions, nor were memoranda drafted following any of the sessions which would help to clarify the situation.

However, the GSA letter of acceptance, or "counteroffer", dated February 19, 1971 contained a paragraph that:

A cafeteria will be placed in operation on a phased basis, concurrently with the delivery of the Waterside Mall West Office space. This cafeteria operation will be expanded food service for the number of personnel occupying the space. The level of service which shall be considered adequate shall be determined by consultation between the Government and lessor.

Notwithstanding the lessor's failure to produce copies of letters or documents which would show a government waiver of the cafeteria and the gross difference in the leases discussed at the March 30 meeting, GSA's Assistant Commissioner for Operating Programs, Mr. Larry Roush, wrote TCMC on April 19, 1972 that the government would *not* withhold rent as previously threatened. The issuance of this letter preempted contracting officer Barton's position to withhold rent, and Mr. Roush deferred action pending completion of a study of the cafeteria issue.

However, shortly after Mr. Roush began to take a more active role in attempting to resolve the dispute, he left the Office of Operating Programs, and in July of 1972, became GSA's Acting Assistant Administrator. Six months later he was appointed Commissioner of the Public Buildings Service, and his successor, Ronald Zechman, as GSA Assistant Commissioner for Operating Programs, became involved in the cafeteria issue.

According to a GSA Inspector General's report, this and other frequent personnel changes appears to have contributed to the shift in the government's position on the cafeteria issue, i.e. that withholding of rent as a means of forcing compliance was inappropriate and/or illegal. The same report concluded that the legal position of GSA's General Counsel had shifted, from an initial position advising withholding of the rent, to a subsequent position that rent withholding was illegal.

The subcommittee was somewhat taken back when we later learned that the Assistant General Counsel for the Public Buildings Division had previously concurred with Barton's February 28, 1972 letter ad-

vising TCMC that rent would be withheld pending compliance. Except for a copy of that letter and copies of the differing versions of Paragraph 10(a), Page 27, of Solicitation No. 55, *no other documents were found in the lease file maintained by the GSA General Counsel's office.* The record is not clear as to what role the office of the GSA General Counsel played in the series of communications between the GSA's Public Buildings Service and TCMC during March and April 1972, when Mr. Roush advised TCMC that rent would *not* be withheld pending further study.

GSA's Coordinator for the Waterside Mall project, Bernard W. Adamec, in his personal status report, notes that by August 1972 the General Counsel's position was that rent withholding was illegal, and that the General Counsel advised the Office of Operating Programs of legal alternatives for obtaining adequate food facilities at Waterside Mall.

There was one statement in Mr. Adamec's notes of particular interest:

As reported previously, EPA is committed to relocating personnel with the September construction completion. This, therefore, negates refusal of occupancy. Withholding of rental payment has been termed illegal by counsel. In an effort to force an early completion of restaurant facilities, a recommendation was offered to state our intent of rental hold-back and utilize the psychological advantage.

By the end of August 1972, it appeared that GSA officials had agreed upon a new strategy to resolve the cafeteria issue. Adamec reported on August 24, 1972, following a discussion among the Assistant Commissioner for Operating Programs, the Assistant Commissioner for Buildings Management, the Acting Assistant General Counsel, and other GSA personnel, that the following course of action would be followed:

A contracting officer's decision will be sent to the lessor informing him that the existing and projected eating facilities do not meet the solicitation requirements for adequate eating facilities. He will be further directed to immediately initiate action for installation of a 10,500 square feet cafeteria. Failure to do so will result in the government taking whatever action necessary to protect its interests. This correspondence will not be sent until after the Assistant Commissioner for Operating Programs has personally discussed the problem with the lessor. A meeting is being arranged for early next week.

That meeting with TCMC was held on August 29. Mr. Bresler steadfastly maintained that he was providing adequate food facilities through a variety of restaurants. He stated his intention of taking legal action should GSA force him to install a "GSI-type" (Government Services Incorporated, a private entrepreneur providing food service to government organizations) cafeteria. GSA requested TCMC to furnish information relative to the seating capacity and size of the restaurants, as well as the projected opening dates.

Despite the strong inference in Mr. Adamec's notes that the contracting officer would act on the cafeteria issue following the August 29,

1972 meeting, no further action was taken for more than three-and-one-half years. This is an unexplainable hiatus for a controversy that had consumed so much time and effort over a twenty-month period.

A GSA Inspector General's Report of July 16, 1980 stated:

The record is largely devoid of information that would provide an adequate explanation for the 3½-year lapse in time. It appears, however, that GSA simply accepted the lessor's plan for providing restaurants, rather than enforcing the cafeteria requirement. Indeed, on November 17, 1972, GSA wrote EPA officials outlining future action it intended to take regarding food facilities at Waterside Mall, and stated, in part, that: "With some eating facilities now available and others forthcoming, our efforts are now concentrated on delivery of the balance of EPA committed space in a timely manner."

When GSA accepted the balance of the Waterside Mall office space under the original lease on February 12, 1974, it took no exception to the lessor's failure to install a cafeteria. Although few additional food facilities had opened in the mall, there was no food facility which resembled the cafeteria as described in the Government's version of the lease agreement.

In late 1975, a series of articles in the newspaper *Federal Times* created renewed interest in the missing cafeteria.

GSA officials conducted a survey in 1976 which concluded that there were indeed inadequate food facilities at the mall. GSA reaffirmed the need for a cafeteria, but decided that the facility should be only half the size originally specified in the lease because several commercial food facilities had opened in the complex since EPA employees had moved into the Mall.

But by 1976, a new GSA contracting officer, Earl W. Eschbacher, had been assigned to the case. Mr. Eschbacher issued a final unilateral decision on or about March 17, 1973, directing TCMC to furnish GSA a schedule showing the dates of construction and occupancy of a cafeteria on or before April 15, 1976. Eschbacher's directive stated that failure of the lessor to comply would leave the GSA with no alternative but to consider further legal action under the terms of the contract or to pursue other actions that would protect the government's interest.

Pursuant to a disputes clause in the lease agreement, TCMC appealed to the GSA Board of Contract Appeals, which conducted six days of formal hearings on the cafeteria issue in July of 1978.

The GSA Board of Contract Appeals issued a decision on March 31, 1980, almost 10 years after the start of negotiations between TCMC and the GSA.

The GSA Board of Contract Appeals ruled that:

Although under the terms of the lease the government was contractually entitled to a complete cafeteria to be furnished by the lessor at his expense, the government, by its conduct and inaction, waived its contract right to have a cafeteria furnished by the appellant.

It concluded that:

The government was estopped from demanding installation of the controversial cafeteria that was at issue.

On June 26, 1980, the GSA Concessions Branch, following a survey of commercial food facilities and blind-operated snack bars, recommended that GSA not develop a cafeteria-type food facility in the Waterside Mall.

IV. OTHER INVESTIGATIONS

GSA officials, acting on the results of the survey and the findings of the Board of Contract Appeals, decided to drop the cafeteria issue. But the dispute and the loss of a contractual right by an agency of the U.S. Government, along with the attendant publicity, had evoked considerable attention over a period of years. For example:

1. There was an inquiry by the GSA Office of Investigations in 1975-76 to determine why the cafeteria was not installed. This report cited no evidence of contract irregularities or of criminal wrongdoing by GSA officials. Nor did the report indicate supporting evidence of Mr. Bresler's claim of an oral waiver of the cafeteria.

2. A GSA Inspector General's Investigative Report dated October 31, 1978, examined the lease acquisition process for possible irregularities, including GSA negotiations with the lessor, the signing of the letter of acceptance and its absence from GSA's files, and possible reasons for the discrepancy between the copy of the lease in possession of the Federal government and that in the hands of the lessor.

3. A second GSA Inspector General's report dated November 6, 1980, predicated on the October 31, 1978 report, concluded that there was insufficient evidence to substantiate irregularities in acquiring the leased space in which the EPA was to be housed.

4. A GAO report (No Cafeteria for Federal Employees at Waterside Mall) dated September 20, 1977 found no evidence of a conscious decision by GSA officials to not enforce the lease, but concluded that TCMC was required to provide a cafeteria facility and that GSA had been ineffective in resolving the issue. The report recommended that GSA require a cafeteria to be provided, or establish a government cafeteria in its leased space and attempt to recover damages from Town Center for noncompliance with the lease agreement.

5. On July 16, 1980, another Inspector General's report was prepared at the request of the Honorable Elliott H. Levitas, then Chairman of the Subcommittee on Public Buildings and Grounds of the Committee on Public Works and Transportation. This report zeroed in on the role and conduct of GSA, EPA and TCMC officials that led to the Board of Contract Appeals March 31, 1980 decision holding that the Federal government had waived its right to a cafeteria as provided for by the lease. The Inspector General concluded that lines of authority in GSA were often confused and that there was a lack of continuity and consistency

in GSA's administration of the lease. There was strong inference that the lack of consistency was, in part, influenced by the efforts to move EPA employees into the newly-constructed office space as quickly as possible.

6. A U.S. Attorney General's report, "Town Center Management Company, Inc.'s Waterside Mall," dated March 15, 1981, was provided to this subcommittee with necessary deletions made to preserve the secrecy of the grand jury investigation then under way. No indictments were returned as a result of the Justice Department's investigation.

Five days of public hearings were held during which thirty-four witnesses testified before this subcommittee. The reports prepared by GSA, the GSA Inspector General, the GAO, as well as the hearing record of the Board of Contract Appeals, were studied, along with the testimony received.

Among the material submitted to the subcommittee was a letter from John V. Mulligan, Assistant General Counsel of GSA's Public Buildings Division, dated September 14, 1981. The last paragraph of that letter provided a succinct explanation of *why* the "missing cafeteria" case followed the course that it did:

In summary, it is our opinion that the contracting officer could not legally withhold rent for breach by the lessor of the covenant to provide food services. Further, the lease agreement did not include sufficient safeguards to insure full performance of the covenant even if a decision had been made by the Government to delay occupancy until all required facilities were furnished. The covenant was obviously intended to obtain a benefit at no risk to the Government but at considerable risk to the lessor. Under the circumstances, even if the cafeteria services had been furnished initially, the lease agreement provided no incentive for continued performance in the event that providing the service became economically burdensome when compared with the potential liability for breach. It is obvious that the lessor failed to perform because the cost of nonperformance was less than the cost of providing the service.

V. EPA'S ACTIVITIES

Before turning to the subcommittee conclusions, it is important to review EPA's role and the impact on its work force when the cafeteria failed to materialize.

Although EPA was not an official party to the Waterside Mall lease agreement and was, therefore, technically unable to negotiate for the cafeteria facility with TCMC, the agency was included in various communications and meetings with the lessor. EPA's Deputy Assistant Administrator for Administration, Howard Messner, assigned Arthur H. Nies, a member of the original Bureau of the Budget task force, to coordinate the Waterside Mall lease space requirements.

While Mr. Nies did not testify in the subcommittee hearings, during an interview with subcommittee staff, Mr. Nies recalled that the cafeteria facility was frequently discussed during meetings between the GSA and EPA officials involved with the space acquisition. Although he personally did not attend the formal negotiation meetings with the

lessor, nor was he present at the lease-signing ceremonies, he recalls that Mr. Bresler, President of TCMC, pointed out the proposed location of the cafeteria facility during a site visit.

Mr. Nies indicated some frustration over getting reliable information concerning EPA's leased space. Eventually EPA officials asked that minutes be taken of relevant meetings and copies sent to TCMC.

Information in EPA files indicates there was substantial effort on the part of EPA's staff to obtain proper eating facilities during the early part of 1972. However, an in-house GSA memorandum dated May 25, 1972, detailing discussions during a May 23, 1972 meeting with Mr. Bresler and GSA and EPA officials, stated that Howard Messner, EPA Deputy Assistant Administrator for Administration, suggested GSA and EPA officials delay further action to obtain the cafeteria facility until the effects of the lessor's planned alternative food facilities could be evaluated. This position was in response to assurances by Mr. Bresler that additional commercial facilities would soon open in the Mall and that he was still attempting to find a cafeteria operator. After a few weeks with no evidence of those "assured" facilities, Mr. Messner, in a letter to GSA Assistant Commissioner for Operating Programs, Ronald Zechman, dated July 21, 1972, reemphasized the lack of suitable eating facilities at the Mall complex and the lessor's apparent inability to meet the schedule agreed upon with GSA and EPA representatives.

The lack of definitive information (on food facilities) and little or no construction in progress makes it necessary to request that GSA take action to implement paragraph 10(a) of Schedule B, Part II of the Solicitation for Offer dated January 19, 1971, regarding a cafeteria to be provided by the lessor at Waterside Mall.

The general content of that letter, however, reinforced the position that EPA as well as GSA officials were willing to accept adequate alternative private food facilities in lieu of a cafeteria.

On November 27, 1972, GSA officials wrote to EPA that they would concentrate their efforts on the delivery of leased space, since private food facilities were available at that time and others would soon open in the mall.

However, in September 1981, in an audit report prepared by EPA's Inspector General at the request of EPA Assistant Administrator for Administration, and in hearings before this subcommittee, EPA officials expressed dissatisfaction with GSA's handling of the cafeteria facility. EPA was not able to take direct action with TCMC to force provision of a cafeteria, and apparently felt that GSA had been remiss in: (1) not appealing the Board of Contract Appeals decision regarding a "de facto" waiver, and (2) not recovering an implicit rental payment from TCMC for a cafeteria which was never provided.

EPA's Dr. John Horton, Assistant Administrator for Administration, stated during the September 15 hearing that he intended to reopen the "missing cafeteria" issue and had arranged a meeting with Mr. Gerald P. Carmen, Administrator of GSA. Dr. Horton later provided an addendum to his formal testimony, stating that he had met with Mr. Carmen and further meetings were anticipated to determine what action should be taken. He indicated there appeared to be coop-

cration between GSA and EPA in attempting to resolve the matter of the "missing cafeteria."

As a result of discussions between EPA and GSA officials, EPA concluded that its legal remedies had indeed been exhausted and, in a December 2, 1981 legal opinion, and separately in a revised audit report by the Inspector General, declared that the Inspector General's office acknowledged the view that EPA had the right to a cafeteria at one time, but that the government now had no legal right to pursue monetary damages in lieu of the cafeteria.

And, the U.S. Department of Justice, in a letter of December 10, 1981 addressed to GSA's General Counsel, concurred in that opinion.

There was by now a virtually unanimous legal opinion that the federal government had no further recourse, and that it had, in fact, forfeited its contractual right to a cafeteria facility.

VI. A TANGIBLE LOSS

The GAO Report to Congress dated September 20, 1977 estimated a "tangible loss" to the federal government of more than \$30,000 a month, increasing to more than \$50,000 a month with inflation and EPA's increased occupancy of the Waterside Mall complex.

GAO's figures were based on input from EPA and represented the value of productive time lost to the federal government as a result of EPA employees' inability to obtain suitable lunches within their allotted 30-minute lunch periods. When EPA was asked to update its estimate of "tangible loss" to the government as a result of the increased occupancy at the Waterside Mall by EPA employees since 1972, they estimated the "tangible loss" to the Federal government as of April 1981 to be between \$56,000 and \$100,000 per month. EPA officials later testified that they were not sure if the approach EPA utilized in calculating those "tangible losses" was legally supportable, and they could not justify their claim of "tangible loss."

VII. FINDINGS AND CONCLUSIONS

The subcommittee hearings clearly reflected there was a loss to American taxpayers, but the exact figure could not be specified.

The subcommittee attributes that loss to GSA officials failure to aggressively pursue provision 10(a) in the government's copy of the lease calling for a lessor-provided cafeteria at no cost to the government, and in space not leased to the government.

The subcommittee's hearings resulted in the following conclusions:

(1) That the Waterside Mall lease agreement negotiated between the GSA and TCMC in February 1971 contained a rental rate which was approximately 10 cents per square foot below the prevailing market rate. This original agreement seems to have been executed in good faith and was at good value to the government.

(2) That the lease agreement did contain a provision requiring TCMC to install a cafeteria facility in the precise manner called for on page 27 of the government's version of the lease agreement. This conclusion is based on the following evidence:

An amended offer submitted by TCMC on February 12, 1971, transmitted by its attorney, which stated:

A cafeteria or cafeterias shall be provided in accordance with paragraph 10(a) of Schedule B, Part III of the offer. Said cafeteria shall be operational concurrent with or prior to occupancy of the general office space by leasee.

Testimony by GSA's chief negotiator before the subcommittee that:

One of the things that I emphasized was the fact that a cafeteria would be required. It was called for in the Solicitation. It was the responsibility of the lessor to provide it in accordance with the provision in that Solicitation.

Testimony by a GSA realty officer who assisted the chief negotiator in the Waterside Mall lease agreement that:

There was a requirement in Solicitation No. 55 for the lessor to provide a cafeteria in the building.

(3) That TCMC officials were aware that the lease agreement contained a provision requiring the firm to provide a cafeteria facility because:

A. Both the chief negotiator and the realty officer serving on the GSA negotiation team testified under oath that they were shown blue lineprints or plans by TCMC officials indicating that a cafeteria facility had been designed to fill space on the second floor of the mall.

B. A sworn statement was given by Mr. Bresler of TCMC to a GSA investigator on June 30, 1976, that:

Page 27 of the lease, which is titled "Vending Facilities," was part of the original lease. During the course of negotiations, the other Page 27, dealing with a cafeteria requirement, was inserted into the lease. However, when the final version of the lease was completed, the requirement for the cafeteria was deleted.

C. A set of brochures provided to GSA officials by Centre Development Association, Inc., a Washington, D.C. professional leasing consultant, indicated the intent of TCMC to provide for a cafeteria in space not leased to GSA.

During a 1971 inspection of the construction site Mr. Bresler pointed out to EPA and GSA officials the intended location of the cafeteria.

D. Reported statements by Mr. Bresler that:

(a) His lease contained a different version of the facilities requirement.

(b) GSA officials gave him a different version of Page 27 to insert into his Solicitation for Offers No. 55 during the lease negotiations.

(c) There was a "written waiver" of the cafeteria requirement by GSA officials, although he was unable to produce such a written waiver or any corroborating document.

(d) He was given an "oral waiver" of the cafeteria requirement. But he could not provide the name of any GSA official or officials who expressed such a waiver.

(e) GSA officials seemed to have accepted the fast food facilities as fulfilling the lease requirement for suitable eating facilities.

(4) That the GSA officials responsible for providing the leased space did not act promptly to require TCMC to install the cafeteria. The government appeared to shift its priority for leased space from combined office space and amenities, (including the cafeteria,) to office space alone. The appearance of snack bars and food vending areas, plus available commercial food facilities, also tended to reduce the pressure for a cafeteria facility.

(5) That TCMC had an obvious economic interest in *not* providing the cafeteria, because Mr. Bresler experienced problems with his prospective cafeteria concessionaire. While potential operators of the cafeteria were wary because of commercial food establishments operating in the mall area, the latter were just as worried about the impact of a GSI-type cafeteria on their businesses.

(6) That GSA could have, and probably should have, withheld rental fees when TCMC claimed that its version of the lease did not require installation of a cafeteria facility. We believe any legal proceedings which might have resulted from withholding of the rent would have been preferable to the agreed "review" which conveniently placed the cafeteria issue in limbo for over 3 years.

We heard testimony which suggested that top officials in GSA, during the period 1972 to 1976, accepted the fact that the private eating facilities provided by TCMC had met the "intent" of the lease.

(7) That there was no written waiver of the cafeteria requirement. We reached this conclusion because GSA officials, who would have known of such a waiver, testified before the GSA Board of Contract Appeals and before this subcommittee that they were unaware of one and that a concerted search for such a written release was unsuccessful. Additionally, we learned that Mr. Bresler told the GSA Board of Contract Appeals:

To this day, they've never given me a piece of paper which says, Mr. Bresler of Town Center, we hereby waive all this.

(8) That it is very unlikely an oral waiver was granted by GSA, and Mr. Bresler's claims of an oral waiver cannot be substantiated by documentation or sworn testimony, either in the subcommittee's hearings or in other previous investigations. It is more likely that GSA officials gradually accepted the wishes, words and actions of TCMC as the economics of the development project soon augured against the cafeteria becoming a reality. TCMC became dissatisfied with its prior commitment. This seems to have been understood by Mr. Larry Roush, GSA's Assistant Commissioner for Operating Programs, whose reported excessive leniency stifled the concerns of GSA officials that the government was being denied something to which it was legally entitled.

(9) That with the passage of time and the apparent reluctance of GSA officials to insist on the government's rights, the GSA Board of Contract Appeals may have been correct in arriving at its 1980 decision that a "de facto" waiver had occurred.

The subcommittee notes that:

(a) The U.S. Government, on February 12, 1974, accepted leased space without reservation of rights with regard to the cafeteria requirement,

(b) The GSA contracting officer did not issue a final decision to TCMC on the cafeteria requirement until March 17, 1976, and

(c) During 1972 and 1973 GSA officials themselves leased for EPA use over 75 percent of the space which had originally been destined for the cafeteria facility in the Waterside Mall complex.

We are disturbed that GSA has no apparent legal standing on which to base further claim for a lessor-provided cafeteria. The U.S. Justice Department concluded that an equity suit would be futile, should not be pursued, and offered the opinion that the success of any suit against the lessor would depend upon overturning the GSA Board of Contract Appeals decision.

Nonetheless, the subcommittee believes that some indirect benefit may eventually accrue to taxpayers and to the U.S. government. We believe this matter should serve as a reminder that there is no statute of limitations on the oversight authority of Congress to establish responsibility and accountability. Officials in government agencies and in private contracting organizations must understand that a contractual right of the U.S. government cannot be forfeited without due process of law. Established procedures to alter contracts must be observed.

We are cognizant that the GSA has taken commendable steps to assure that history does not repeat itself.

Nine months after the subcommittee began its review of the administration of this lease GSA established a task force to develop and implement methods to deal with problem areas within the leasing program. The task force focused on documentation practices and procedures, with the result that GSA officials have initiated the following changes to upgrade record-keeping and leasing practices:

(A) A simplified, easy-to-read handbook has been prepared to supplement the existing PBS P1600.1 "Leasing Guides." The handbook outlines specific procedures to be followed in executing lease acquisitions, lease administration and the management of succeeding leases.

(B) A standardized lease file format is being developed for nationwide use. Information will include market surveys, justification for the lease award and details of administration. Efforts are being made to standardize lease clauses and to clearly spell out lessor obligations. A newly-created GSA oversight office will review the documentation.

A second task force, a contract/lease administration task force, was formed in May 1983 and includes personnel from GSA's Public Buildings Service and the GSA Inspector General's office. This task force is expected to issue a report calling for additional reforms.

We are pleased that an improved GSA training program is being developed. However, we note that an intensive in-house training program for realty specialists which was recommended by the GSA Inspector General in a March 1982 Audit Report, "An Approach to Improving GSA's Leasing Program," has not been implemented. The subcommittee believes such a training effort would be beneficial.

In general, the subcommittee does not visualize excessive involvement in specific GSA practices and procedures as its role. It is concerned more about policy issues and sound stewardship of the huge responsibility that rests with the agency. GSA is, after all, responsible for providing for 22 federal agencies that lease about 220 million

square feet of space in the United States, an annual rent in excess of \$1 billion, and a total commitment until lease expiration of over \$4 billion. From 1968 to 1981, leased space under GSA's control increased from about 48 million square feet to 90 million square feet, while annual rental increased from about \$150 million in 1968 to \$521 million in 1979 and \$680 million in 1981.

Twenty years ago, 82 percent of the federal employees provided office space by GSA were in government-owned space. Today that figure is about 50 percent. Suffice it to say this increase in the amount of leased space utilized by the government justifies GSA moving quickly to improve the dismal administrative record which has been paraded before the subcommittee in these hearings.

Perhaps we should look at the record compiled in these hearings as "things we do not do any more." Nonetheless, it amply demonstrates that unless the guidelines are in place and strictly adhered to, the government can be denied what it is rightfully entitled to without recourse to satisfaction for the loss endured. We believe it is incumbent upon the GSA to properly instruct and prepare those who would negotiate in the government's interest so that those rights are properly secured. The subcommittee wants to make it clear that we intend to continue monitoring the performance of the GSA in such transactions and to reconvene whenever necessary for further discussions on these matters. We shall be watching and reviewing GSA's record as they implement the proposals and improvements discussed during these hearings.

